IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1585

FOREST D. McGUIRE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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PRIOR OPINIONS

On March 30, 1976, the United States Court of Appeals for the Sixth Circuit filed an order denying Petition for Rehearing and affirming its opinion filed February 23, 1976, which affirmed the decision of the United States District Court for the Middle District of Tennessee finding the Petitioner guilty of a single violation of Title 18, United States Code, Section 2113 (c). The decision of the Sixth Circuit Court of Appeals was not published. That opinion, the order denying rehearing and the District Court's finding of facts pursuant to Rule 23 (c), Federal Rules of Criminal procedure are set forth fully in the appendix to this Petition.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner contends that the Due Process Clause of the Fifth Amendment to the Constitution of the United States and the Fourth Amendment to the Constitution of the United States have been violated:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT 4

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The relevant Federal Statutory Provisions are found in Title 18, United States Code, and read as follows:

> Section 2113. Bank Robbery and incidental crimes.—(a). . . . (b) Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value exceeding $100 belonging to, or in the care, custody, control, management, or possession of any bank, or any

> savings and loan association, shall be fined not more than $5000/or imprisoned not more than ten years, or both; or . . . (c) Whoever receives, possesses, conceals, stores, barters, sells, or disposes of any property or money or other thing of value knowing the same to have been taken from a bank, or a savings and loan association, in violation of subsection (b) of this section shall be subject to the punishment provided by said subsection (b) for the taker.

QUESTIONS PRESENTED

1.

SHOULD DUE PROCESS ESTOP THE GOVERNMENT FROM CLAIMING "HONEST MISTAKE" CONCERNING THE LOCATION FROM WHICH PHYSICAL EVIDENCE WAS RECOVERED IN PETITIONER'S CASE, WHEN IN A PRIOR PROCEEDING INVOLVING DIFFERENT DEFENDANTS THE GOVERNMENT PROVED THAT THE SAME EVIDENCE CAME FROM A DIFFERENT LOCATION.

2.

WAS THERE PROBABLE CAUSE FOR PETITIONER'S WARRANTLESS ARREST; AND IF NOT, SHOULD THE EVIDENCE SEIZED HAVE BEEN SUPPRESSED.

JURISDICTIONAL STATEMENT

This cause is before the Court pursuant to Rule 19-1(b), in that the Court of Appeals for the Sixth Circuit had, by its decision, denied Petitioner Due Process of Law by allowing the United States Government to adopt fundamentally inconsistent positions concerning identical evidence that formed the basis for two separate and distinct criminal convictions.

The Sixth Circuit has also deprived Petitioner of his Fourth Amendment Right to be free from an unreasonable search and seizure by affirming the District Court's decision to permit evidence that formed the basis for Petitioner's conviction to be introduced into evidence at trial.

STATEMENT OF FACTS

Petitioner was charged with possession of money stolen from a federally insured bank, knowing the money to have been stolen in violation of 18 U.S.C. § 2113 (c). The government first introduced evidence that during the early morning hours of October 14, 1971, the Fallston Branch of the Union Trust Company of Shelby, North Carolina, a bank insured by the Federal Deposit Insurance Company, was burglarized by one or more persons using an acetylene tank and burning bar to enter the vault. Because a burning bar was used, some of the stolen money was burned. (Tr. 47-61).

The bank maintained certain marked bundles of twenty-dollar bills which were used as "bait money". Two bundles of "bait money" were included in the money stolen from the bank. (Tr. 61).

The government next produced the testimony of Mrs. Mary Dabbs, Manager of the Litton Apartments in Nashville, Tennessee, who testified that burned money was used to rent two apartments in her complex, apartments C-26 and H-6 (Tr. 65-66). Mrs. Dabbs contacted the Nashville police and later turned the money over to the Nashville officer of the Federal Bureau of Investigation, which was at the time investigating bank burglaries. (Tr. 66). After some background investigation had proved the employment of one of the occupants of these two apartments to be false, Agents Darrell Hamer and Richard Knudson of the F.B.I. went to the Litton Apartments on November 23, 1971, to question the occupants of the two apartments. (Tr. 79).

Agents Hamer and Knudson arrived at the Litton Apartments and proceeded to Apartment C-26 where

they found a man and woman. The man identified himself as Lawrence Brooks and the woman, who was leaving as the agents entered, identified herself as Ann Brooks. (Tr. 80-81). After staying in apartment C-26 a short time the agents were proceeding to Apartment H-6 when they were met by Lt. Titsworth of the Metropolitan Nashville Police Department, who had arrived answering a call from the resident manager's husband, Mr. Dabbs. Mr. Dabbs had seen a man climbing out of the third floor of "C" building and thought he might have been a burglar. (Tr. 82).

The agents and police officers went to Apartment H-6 where they found three individuals: a man who identified himself as Arrites Oden, the woman, Ann Brooks, who had been seen in Apartment C-26 and the petitioner, who identified himself as Cotton McGuire, and who produced an Illinois drivers license to verify his identity. (Tr. 83, 88, & 167). None of the other individuals present offered any proof of identity. (Tr. 84).

After some of the officers returned to Apartment C-26 and found no one there, Titsworth arrested all of the people present in Apartment H-6 and took them to police headquarters. (Tr. 85, 86, 87). Prior to placing him in a police car the petitioner was searched. (Tr. 168). After emptying his pockets on the desk at the police station and being searched again, the petitioner was placed in a chair in the office of Lt. Joseph Godsey. (Tr. 169-170). Officer Bill Nicholas, who was in an office across from Lt. Godsey's office, testified that he observed petitioner with his hand up under the chair in which he was seated. (Tr. 119). After petitioner was removed to another room for questioning, Officer Nichols stated he then went into Lt. Godsey's office, examined the chair and found $500.00, three one-hundred dollar bills and ten twenty-dollar bills (Tr. 119-120). Petitioner denied

having possession of the $500.00 or placing it in the chair. (Tr. 170-171). Officer Nichols testified that he took the money to Lt. Clarence Huffman, Jr., who took custody of the currency (Tr. 120-121). Neither of these officers mentioned the money to the F.B.I. agents, who were at the station at the time. (Tr. 125 & 135). The money was turned over to Agent Knudson of the F.B.I., but not until November 29, 1971. (Tr. 135). Agent Knudson testified that two of the twenty dollar bills, serial numbers L47432018A and B44557041A, were identified as "bait money" from the Fallston bank burglary. (Tr. 147-148).

Petitioner was not charged with any offenses relating to the money found and was released the next day. Petitioner was not indicted until two and one-half years later on May 30, 1974. (Tr. 3).

At the trial of the principals of the bank burglary, *U.S.A. v. Willie Foster Sellers, et al*, No. SH-CR-73-55, in the United States District Court for the Western District of North Carolina, Detective R. C. Jackson of the Nashville Police Department testified that he was in charge of the search of the two apartments occupied by the defendants in Nashville. Detective Jackson testified at this time that the two twenty-dollar bills, serial numbers L47432018A and 844557041A, were part of the money found in Apartment C-26 of the Litton Apartments. (Tr. 218-220). At the trial of the instant case however, Detective Jackson testified that he did not know where these two twenty-dollar bills came from and could not say for certain that they did not come from Apartment C-26. (Tr. 103-104).

Prior to trial, petitioner filed a Motion to Dismiss the Indictment, seeking that the Government be estopped from adopting a completely inconsistent posture in its

intended proof that the subject matter of petitioner's prosecution (the currency) was recovered from an entirely different location than had already been proved in the prior trial.

The Court denied petitioner's motion and considered the problem as one of mere credibility of the testifying officer.

In its Memorandum of finding of facts, the Court classified this major inconsistency in the Government's proof as a mistake and only an example of poor police work. (Tr. 16-17).

In addition, petitioner filed a Motion to Quash his arrest and suppress the currency seized as a direct result of that arrest in Apartment C-26. Petitioner argued that his arrest was not based upon probable cause to believe he had committed any crime. The court also denied this motion.

ARGUMENT

1.

DUE PROCESS ESTOPS THE GOVERNMENT FROM CLAIMING "HONEST MISTAKE" CONCERNING THE LOCATION FROM WHICH PHYSICAL EVIDENCE WAS RECOVERED IN PETITIONER'S CASE, WHEN IN A PRIOR PROCEEDING INVOLVING DIFFERENT DEFENDANTS THE GOVERNMENT PROVED THAT THE SAME EVIDENCE CAME FROM A DIFFERENT LOCATION.

Petitioner was convicted of a violation of Section 2113 (c) of Title 18 United States Code, specifically, possession of stolen bank money. Prior to Petitioner's trial, the Government indicated and convicted Willie Foster Sellers and Alton Wayne Ruff of bank burglary in the Western District of the North Carolina District Court, case number SH-CR-73-55. During the Ruff-Foster trial, certain United States Currency was introduced and admitted into evidence by the Government as coming from an apartment searched by police after the Ruff arrest.

During petitioner's trial, the Government took a contrary position with regard to that same currency, now maintaining that it was in fact recovered from a chair on which Petitioner McGuire was sitting while in the Nashville Police Station.

In the North Carolina bank burglary trial, Detective R. C. Jackson of the Nashville Police Department testified that the two twenty-dollar "bait bills", serial numbers L47432018A and 844557041A were recovered from Apartment C-26 in the Litton Apartments in Nashville, Tennessee. (Tr. 218-220).

Almost three years later, petitioner was convicted in the instant matter of possession of that very same

money. The Government, through the testimony of the same officer, R. C. Jackson, successfully explained his prior testimony as a mistake discovered the day before Petitioner's trial (Tr. 97, 98; 105-106). In spite of Officer Jackson's testimony at the prior trial given with inventory slip in hand that the money was recovered from apartment C-26 (this testimony contributing to the conviction of Ruff and Sellers), the Government in Nashville was allowed to prove that petitioner was in possession of the same bills in the Nashville police station.

Petitioner asked the Sixth Circuit Court of Appeals to consider the issue presented within the logical framework of the Due Process Clause of the Fifth Amendment, and to apply principles of Collateral Estoppel as this Court recognized in *Ashe v. Swenson*, 397 U.S. 436 (1970). The Sixth Circuit refused treating the entire issue as a mere question of credibility of the officers who recovered the money.

Petitioner maintains that the Sixth Circuit's reasoning ignores the purpose for which the Doctrine of Collateral Estoppel was first recognized and applied in a criminal case. For in every case wherein the Doctrine was applied, there necessarily existed inconsistent testimony of some kind in separate litigations. The Doctrine's purpose is to prohibit a party for policy reasons, whether due process or double jeopardy, from urging inconsistent postures concerning the same fact. If the Sixth Circuit's reasoning, as set out in its opinion, is correct the Doctrine of Collateral Estoppel would no longer exist.

> Collateral Estoppel, as defined in *Ashe v. Swenson*, 397 U.S. 436 (1970), means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be relitigated between the same parties in any future lawsuit. (at 443).

This language indicates three requirements that must be met for the proper application of the doctrine. First, there must be an issue of ultimate fact that was relitigated in the case under review. An ultimate fact is "one of these facts, upon whose combined occurrence the law raises the duty, or right in question". *The Evergreens v. Nunan*, 141 F.2d 927, 928 (2d Cir.) (L. Hand. J.) cert. denied 323 U.S. 720 (1944).

As the United States Supreme Court stated in *Yates v. United States*, 354 U.S. 298, 338, 77 S.Ct. 1964; 1 L.Ed. 2d 1356, 1385 (1955):

> The doctrine make conclusive in subsequent proceedings only determinations of fact, and mixed fact and law, that were essential to the decision. The normal rule is that a prior judgment need be given no conclusive effect at all unless it establishes one of the ultimate facts in issue in the subsequent proceeding.

(See generally 1B Moore Federal Practice, paragraph 0.442 (2) 1965).

The location of the currency in question is clearly an ultimate fact in petitioner's case. The essential element of the charge against petitioner was possession of the proceeds of the prior bank burglary. This prosecution was predicated on the Government's claim that the money alleged to be in petitioner's possession, was recovered from a chair on which he was sitting in the police station. Obviously, if that money, in fact, came from Apartment C-26 as proved in the prior proceeding, petitioner could not possibly have been convicted in the instant cause.

The second requirement to be met in connection with the application of collateral estoppel is the need for mutuality and privity of parties between the two law-

suits. Petitioner was not a party to the bank burglary prosecution, but the Government certainly was. Ample opportunity to litigate this issue was afforded the Government in the first lawsuit and it ought not now be permitted to disown the results of that litigation. The view requiring only that the party against whom such an estoppel is pleaded be a party to the original action, accords with the most modern and advanced view of the mutuality requirement.

Since *Bernhard v. Bank of America*, 19 P. 2d 892 (1942), strangers to the first litigation have been increasingly permitted to rely on factual decisions necessarily a part of those proceedings against parties to the first litigation in subsequent proceedings. This rule was applied in *Graves v. Associated Transport*, 344 F. 2d 894 (4th Cir. 1965) and *Bruszewski v. United States*, 181 F. 2d 419 (3rd Cir. 1950).

While the vast majority of cases in which this modern view of the mutuality requirement has been accepted, are civil litigations, the principles are no less applicable to criminal proceedings. See *United States v. Powers*, 467 F. 2d 1089 (7th Cir. 1972), decided on other grounds.

The third requirement inherent in the *Ashe* Court's definition of collateral estoppel is that the ultimate fact in question be "determined". An examination of *Ashe*, *supra*, and its reliance on *Evergreens v. Nunan*, *supra*, would indicate that application of the doctrine of collateral estoppel requires that a fact is "determined" when "it is necessary to the result of the first suit". *Evergreens v. Nunan*, *supra* at 928. This is explained in *Ashe*, *supra*, at 444, as "whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration." However, the United States Court of Appeals for

the Seventh Circuit's most recent interpretation of *Ashe* would attach equal importance in considering the application of collateral estoppel to the requirement that the ultimate fact in question was necessary to the result of the second suit.

United States v. Powers, 467 F. 2d 1089 (7th Cir. 1972) cert. denied, 410 U.S. 983, was a mail fraud prosecution of the attorney-defendant Powers resulting in his conviction on one of the eight counts alleged in the indictment. During the trial, the defendant attempted by way of irrelevant and duplicitous questions, and by way of a side-bar conference to introduce evidence of the fact that a co-defendant, Fidanzi, had previously been convicted of income tax evasion involving identical items of income, namely, the same two checks the defendant Powers was convicted of receiving by mail.

Powers appealed, claiming that the Government was collaterally estopped from prosecuting the defendant by taking the inconsistent position that the same checks upon which Fidanzi was convicted of tax evasion, could subsequently be claimed to have been received and attributed to the defendant Powers. The defendant also claimed that the Government agent's prior testimony that the checks in question belonged to Fidanzi, constituted a judicial admission binding on the Government and precluded them from asserting in the subsequent prosecution that those same checks could be attributed to Powers.

The Court of Appeals, with Judge Stevens, (now Justice Stevens), dissenting, affirmed the conviction and held at 1014:

> . . . . the doctrine of collateral estoppel would not be appropriate here as Powers' trial did not involve the relitigation of an ultimate fact. There is no such

> inconsistency between Fidanzi's conviction on the tax case and Powers' claimed guilt in the present case. First, it is clear that the jury in Fidanzi's tax case could have found that his income was in excess of $600 without attributing the two checks in question to him since there was another $9000 in income charged to him by the Government. *But, equally important is the fact that Powers could have been guilty of mail fraud in this case without ever having received any of the proceeds of the check. One does not have to share in the proceeds of a crime to be guilty of the crime.* [emphasis added]

In considering the question of a judicial admission, the Court also held at 1093:

> We do not say, because we do not need to reach the question, that the government's position in a prior criminal trial may never be asserted in some form against the government in subsequent criminal litigation.
>
> Thus, if the defendant had made a record by appropriate offer to prove of the fact that the Government had successfully prosecuted Fidanzi for tax evasion in connection with his sole receipt of certain specified items of income, this being done in a case in which the Government was attempting to prosecute Powers for his sole receipt of the identical items of income . . . we might have to give serious consideration to whether the offer to prove should not have been sustained on the basis, at the very least, that it concerned a judicial admission of the Government.

The instant cause presents the very situation that the Seventh Circuit indicated would meet the question of collateral estoppel, or at the very least constitute a judicial admission by the Government. For, unlike the situation in *Powers*, petitioner McGuire's conviction depends entirely on where the questioned money was recovered (see Judge Stevens' Dissent page 1097

paragraph 3.) Also, unlike the state of the record in *Powers*, petitioner properly offered the inconsistent testimony of Officer Jackson to the Court in connection with the motion to dismiss the indictment. (Tr. 23-27). In addition, the entire testimony of Officer Jackson in the prior bank burglary trial was admitted into evidence in the defendant's case-in-chief. Thus, the issue was properly before the Court. Petitioner maintains that it was error for the Court to treat the question merely as one of credibility of the witness.

Whether the matter at hand is properly collateral estoppel or is construed as a prior judicial admission binding on the Government, must not over shadow the fundamental injustice to which Petitioner's argument addresses itself. The prosecution ought not be allowed to reap the benefits of its own conflicting factual proofs in these two cases.

Petitioner is mindful of this Court's holding in *Ashe* (*supra* 1970) that Collateral Estoppel is an ingredient of the Fifth Amendment guarantee against double jeopardy. Petitioner makes no such double jeopardy claim here. But the factual situation presented in the case at bar requires that the due process clause of the Fifth Amendment be applied in order to protect petitioner and future defendants from the Government's dangerous and reckless conduct in this matter.

It defies fundamental notions of fair play and justice to allow the Government to convict in two separate cases on the basis of the same evidence, which if believed in the first case, requires acquittal in the second. That the Government seeks to justify this conduct by claiming it was just an honest mistake is no excuse. For inherent in "our concept of ordered liberty" is the notion that the Government, like its citizens, must be responsible for its

actions lest we run the risk of unlimited prosecutions at the whim of the sovereign.

Petitioner, on this showing respectfully requests that a Writ of Certiorari issue to the Sixth Circuit Court of Appeals, and that this Honorable Court review the decision of that Court in depth.

PETITIONER'S WARRANTLESS ARREST WAS NOT BASED ON PROBABLE CAUSE AND THEREFORE THE EVIDENCE SEIZED SHOULD HAVE BEEN SUPPRESSED.

Petitioner urges that this Court review in depth the circumstances surrounding his arrest. The Sixth Circuit, in affirming his convictions, merely held that "an examination of all the circumstances surrounding the arrest convinces us that there was probable cause for an arrest without a warrant." The Court cited *United States v. Watson*, ... U.S. ..... (44 U.S.L.W. 4112, January 26, 1976) which petitioner maintains has no logical connection to the facts in the instant case. Indeed, application of *Watson* to the facts in petitioner's case would require suppression of the evidence seized.

Watson presents the classic probable cause case wherein a Law enforcement officer acts on information that relates to a specific individual concerning a specific crime. The arresting officer, (a postal inspector), had received information from an admittedly reliable informant that the defendant and the informant were involved in the use and possession of stolen credit cards. At the time of Watson's arrest, the inspector was also armed with corroborative evidence from the informant in the form of a stolen credit card that had come from the defendant.

In petitioner's case at the time of his arrest, the FBI agents had no prior information concerning him. They were called to the apartment to investigate a complaint that burned money was used to rent two apartments in the complex. After a background investigation of one of the listed occupants of these two apartments proved false, the Agents decided to question the occupants. Petitioner was not listed as an occupant nor was he occupying either apartment. (Tr. 79).

Upon their arrival, the agents met three individuals: a man who identified himself as Arristes Oden (a listed occupant), a woman, Ann Brooks, and petitioner. Of the three, only petitioner presented any verification of his identity. He exhibited an Illinois Driver's license in the name Forest McGuire. (Tr. 83, 88, 167).

The Agents, not satisfied with everyone's explanation for their presence on the scene, arrested the three people and transported them to the Nashville Police Station for further questioning. During the next several hours, petitioner was questioned extensively and subsequently released without charge. The Government alleged at petitioner's trial that it was at some point during the period of confinement that the currency was recovered from a chair upon which petitioner was sitting.

Probable cause, one of the most often quoted phrases in our criminal law, exists when a law enforcement officer has reasonable cause to believe that the person to be arrested has committed, is committing, or is about to commit a crime. Reasonable cause or reasonable grounds has been defined as, the existence of specific, articulable facts, whether by direct personal observation or hearsay information, that leads an officer to believe

that a particular crime (or crimes) was committed or is about to be committed. *Draper v. United States*, 358 U.S. 307 (1959), *Carroll v. United States*, 267 U.S. 132 (1925), *Henry v. United States*, 361 U.S. 98 (1959).

In the present situation, the arresting officers were not aware of any facts, either prior to or at the time of petitioner's arrest, which tended to establish that he had committed any particular crime.

Admittedly, petitioner was taken into custody for questioning about his presence in the apartment. He was released without charge several hours later. While the actions of the other people in the apartment may have given rise to some suspicion, that alone cannot serve as probable cause for petitioner's arrest. Without some facts connecting petitioner to any specific crime, or for that matter even connecting him to the occupants of the apartment, petitioner's mere presence in the apartment cannot be sufficient cause for his arrest.

United States v. DiRe, 332 U.S. 581, 68 S.Ct. 222, 92 L.Ed. 210 (1948), cited by petitioner in his Brief before the Sixth Circuit, and cited by this Court in *United States v. Watson* (supra, 1976) presents a factual situation strikingly similar to the instant matter. In *DiRe*, an officer was informed by one Reed that he was going to purchase counterfeit ration coupons from a man named Bultitta. The officer followed Bultitta and observed him enter DiRe's car. The officer went to the vehicle and found Reed on the back seat holding two counterfeit coupons. The defendant was seated by Bultitta on the front seat. All three were taken into custody. The officer had no warrant for arrest. At the police station, DiRe was ordered to place the contents of his pockets on the table. This revealed two gasoline and several fuel oil ration coupons. Two hours later DiRe was booked and

throughly searched, at which time 100 gasoline coupons were found. All turned out to be counterfeit. The defendant was convicted of knowingly possessing counterfeit gasoline coupons, a misdemeanor. In reversing DiRe's conviction because of the lack of probable cause to arrest, the Court noted that the only crime committed in the officer's presence was by Reed, the informant, who was observed in possession of the coupons. As to Bultitta, the officer had previous information that would appear to be corroborated by what he had observed. But there was no information about DiRe, nor could his presence in itself give rise to probable cause to arrest for the illegal possession of the coupons. See also *United States v. Spies*, 132 F.Supp. 534 (E.D. Tenn. 1955); and *United States v. Bazinet*, 462 F. 2d 982 (8th Cir. 1972).

Finally, based upon petitioner's showing that his arrest was not predicated upon probable cause, the currency recovered was therefore inadmissible fruit of that unconstitutional arrest. That evidence should have been suppressed. *Brown v. Illinois*, 422 U.S. 590 (1975), *Wong Sun v. United States*, 371 U.S. 471 (1963).

CONCLUSION

Petitioner has demonstrated the violation of his Fourth and Fifth Amendment Federal Constitutional rights and therefore prays that the Writ of Certiorari issue from this Honorable Court to the Sixth Circuit Court of Appeals to review that Court's opinion in the instant case.

Respectfully submitted,

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APPENDIX

Do Not Publish

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 75-1012

UNITED States OF AMERICA,

Plaintiff-Appellee,

v.

FOREST D. McGUIRE,

Defendant-Appellant.

Appeal from the United States District Court
for the Middle District of Tennessee.

DECIDED and FILED FEBRUARY 23, 1976

Before: EDWARDS, PECK and LIVELY, *Circuit Judges.*

PER CURIAM. After waiving trial by jury the defendant McGuire was found guilty by the court of knowing possession of money stolen from a federally insured bank in violation of 18 U.S.C. § 2113(c). McGuire was arrested in an apartment after the owner had reported to the police that rent for two apartments had been paid with burned currency. The police were investigating a bank robbery in which a burning bar had been used to enter the vault and in which two bundles of twenty dollar bills maintained as bait money were taken.

After being detained for a short time at police headquarters McGuire was released without any charges having been placed against him. Thereafter, during the trial of two persons accused of having

robbed a bank a government witness identified certain United States currency, including two of the twenty dollar bills which were part of the bait money, as having been taken from one of the apartments on the day that McGuire was arrested. More than two years later at McGuire's trial the same government witness testified that he had made a mistake in the bank robbery trial in identifying the two twenty dollar bills and that these in fact had been found secreted beneath the seat of a chair in which McGuire sat while being detained at police headquarters. Another officer testified that while McGuire was in the chair in question he saw McGuire reach under the seat of this chair and that immediately after McGuire left the room he found some currency under the seat including the two twenty dollar bills identified as bait money.

On appeal McGuire argues that fundamental fairness requires that the government be consistent in its position as to the location of the currency, and charges that he was denied due process by the inconsistency of the government in this respect. No authoritative support for this position was produced. McGuire was not a party to the bank robbery prosecution in which the first testimony was given concerning the currency. McGuire invokes principles of collateral estoppel, but the cases cited are clearly distinguishable. The government admitted the inconsistency in the police officer's testimony and furnished the district court with a copy of that officer's previous testimony relating to the location of the currency at the time it was seized. The officer testified that he was just mistaken in the first trial and that the custody records of the two twenty dollar bills in question showed that they had actually not been found in the apartment but were recovered from the chair in which the defendant had been sitting. The government was not estopped to prosecute McGuire for possession of the currency in question by reason of the fact that mistaken testimony of a

witness in a previous case was inconsistent with that witness' testimony in this prosecution.

McGuire also sought to suppress the evidence on the ground that the police did not have probable cause to arrest him at the apartment. An examination of all the circumstances surrounding the arrest convinces us that there was probable cause for an arrest without a warrant. *See United States v. Watson*, ... U.S. ..... (44 U.S.L.W. 4112, January 26, 1976).

The district court, trying defendant without a jury, made a specific finding that the defendant had secreted the currency under the chair while being detained at the police station. This finding is supported by substantial evidence, contrary to the position of defendant that there was not sufficient evidence to support his conviction.

The judgment of the district court is affirmed.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 75-1012

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

FOREST D. MCGUIRE,

Defendant-Appellant.

ORDER

Before: EDWARDS, PECK and LIVELY, *Circuit Judges.*

Upon receipt and consideration of a petition for rehearing filed herein by the defendant-appellant Forest D. McGuire, the court being advised concludes that said petition is without merit.

The petition for rehearing is denied.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman
Clerk

Filed March 30, 1976

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

No. 74-110-NA-CR

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

FORREST D. MCGUIRE,

Defendant-Appellant.

MEMORANDUM

In response to the defendant's motion for findings of fact pursuant to *Rule 23(c), Federal Rules of Criminal Procedure,* the Court finds as follows:

The evidence conclusively shows that during the evening or early morning hours of October 13 and 14, 1971, the Fallston Branch of the Union Trust Company Bank of Shelby, North Carolina, a bank insured by the Federal Deposit Insurance Corporation, was burglarized and approximately Fourteen Thousand Three Hundred Fifty Seven Dollars ($14,357.00) was stolen from the custody of the bank by one or more burglars. The burglars used an acetylene torch and burning bar to enter the bank vault and an inner safe. As a result of this action, a portion of the money stolen was burned.

The bank maintained a list by serial numbers of several five hundred dollar bundles of twenty-dollar bills for use as "bait" money. Two such bundles of "bait" money were taken from the bank during the burglary. Included in the money taken were twenty dollar bills serial numbers L47432018A and B44557041A.

In November 1971, the Nashville office of the FBI received information that burned money was being used to pay rent on two apartments in the Litton

Apartments in Nashville, Tennessee. At that time, agents were investigating one or more bank burglaries in which burned money was a likely product. Agent Knudsen of the FBI on November 22, 1971, had checked the employment listed by the occupants of one of the apartments where burned money was being used. He learned that the employment listed by the occupant was false.

On November 23, Agents Hamar and Knudsen of the FBI went to the Litton Apartments with the intention of questioning the occupants of Apartment C-26 and H-6 concerning this burned money.

Upon arrival at Apartment C-26, the agents were admitted approximately four minutes after they had initially identified themselves as agents of the Federal Bureau of Investigation. The male occupant of the apartment identified himself as Lawrence Brooks and stated that the female occupant of the apartment who left as the agents were arriving was his wife. He later amended this to state that she was his girlfriend. The female occupant stated that she was going to the store as she left. The agents remained in the apartment only a short time before being asked to leave. As the two agents left the apartment building which contained Apartment C-26, they were met by Lt. Titsworth a uniformed Metropolitan-Nashville Police Officer and he advised them that the apartment manager had reported a man jumping from the third floor, Apartment C-26 and fleeing the area.

The officers knew that the occupants of Apartment H-6 and C-26 were supposedly related and did associate together. They therefore proceeded immediately to Apartment H-6 where they located the defendant McGuire, the same female who had previously been in Apartment C-26 and who gave them the name of Ann Brooks, and a second male who identified himself as Arrites Oden. Mr. Oden claimed that he was employed by Permaguard in Nashville. The agents knew that there was no such

individual employed at Permaguard. The female identified the male occupant of Apartment C-26 which she had just left as Ray Perry. She denied that she was either his girlfriend or married to him. The officers knew that Apartment H-6 was rented in the name of Blanton. While Agent Hamar remained with the three individuals in H-6, Agent Knudsen and other officers returned to Apartment C-26 to requestion Mr. Brooks. They determimed upon arrival back at C-26 that he had fled.

The officers therefore determined to take the occupants in Apartment H-6 to the police station for identification and questioning. Upon inspecting the female's purse for weapons, a large quantity of burned money was observed.

At the police station, the officers learned that the true identity of the man claiming to be Oden was actually Alton Wayne Ruff, a fugitive, and the female claiming to be Ann Brooks was in fact Mildred Lauer, also a federal fugitive. A search of the person of Mr. Ruff revealed a "bait" bill from the Fallston Branch as part of the Five Hundred Sixty Nine Dollars currency which he had upon his person.

While at the police station, the defendant McGuire was placed in the office of Lt. Godsey of the Metropolitan Police Department and Officer Bill Nichols of the police department was able to observe Mr. McGuire from a room directly across the hall from Lt. Godsey's office. Nichols observed the defendant with his hand up under the chair that he was seated in. Nichols waited until the defendant was removed to another room for questioning by the FBI and he then immediately went to the chair the defendant had been sitting in and examined it. In the bottom of the chair, he found three one-hundred dollar bills and ten twenty-dollar bills a portion of which was burned on the corners. Lt. Godsey recalled being in the room and observing Detective Nichols find a quantity of money in the chair which the defendant McGuire had recently vacated. Nichols testified and

the record supports the fact that he immediately took the money recovered from the chair to Lt. Huffman and turned the money over to him. The money was placed in a sealed envelope signed by Nichols. (Exhibit 101) He left the envelope and its contents with Lt. Huffman. The lieutenant maintained custody of the envelope and its contents until November 29, 1971, when he turned the envelope and the five hundred dollars it contained over to Agent Knudsen of the FBI and with him prepared a joint inventory by serial numbers of the bills. (Exhibit 103) Agent Knudsen testified that he secured the envelope signed by Bill Nichols from Lt. Huffman and with Lt. Huffman inventoried it. Two of the twenty dollar bills contained in the envelope were identifiable as being "bait" money taken from the Fallston Branch of the Union Trust Bank.

The defendant McGuire was not charged with any offenses involving the burned money at that time. He posted bond on minor state offenses and was released within the next day or so.

The Litton Apartments Manager Mr. Dabbs testified that after he had chased the individual who climbed out of Apartment C-26, he had lost him toward the rear of the apartment complex. While attempting to locate this person, an individual he identified as the defendant drove up beside him and asked if he had found the man or did he get him or some words to that effect. At the point where the defendant McGuire made this inquiry, he was some distance from Apartment H-6 and in an area to the rear of the apartment complex away from the entrance to the complex.

Miss Carolyn Sue Alexander, a witness closely connected with the actual burglary of the Fallston Branch, was called as a Government witness. Miss Alexander testified that she knew Wayne Ruff quite well and he in fact had fathered a child born to her shortly before the Fallston Branch burglary. She further testified that she, Mr. Ruff, the defendant

McGuire, and his girlfriend Sharon Forsyth had lived together for a period of time in Alabama in the early part of 1971. She testified that after the burglary of the Fallston Branch, she had observed bank bags from the bank and had observed a large quantity of money which was dried at the house where she was staying in North Carolina. She observed that a large quantity of the money besides being wet was burned about the edges and had small pin type holes in it. With her at this time were Wayne Ruff, Larry Hacker, Foster Sellers, David Land and Millie Lauer as well as Raymond Perry. Mr. McGuire was not there.

She further related that within the group with which she had been associated, a "courtesy cut" meant that actual perpetrators of an offense would at times give other members of the group part of the proceeds of their illegal activity.

After Mr. McGuire was arrested and released, she testified that in a conversation with her Mr. McGuire related that Larry had done something stupid by paying rent in burned money and that the FBI had come to the apartment to investigate and Millie had led them to the apartment where he and Ruff were located. He told her that he was lucky to get away before the police knew what they did and that he had walked out before they knew what was going on.

The explanation offered by the defendant for his presence in Apartment H-6 and his activities thereafter is inherently unbelievable and the Court does not believe it.

The fact that, in an earlier trial, Officer R. C. Jackson identified the same two "bait" bills found by Detective Nichols as coming from Apartment C-26, is explained to the Court's satisfaction as a mistake by Jackson in his earlier testimony. While it is certainly an example of poor police work by Jackson in that case, it does not detract from the clear evidence linking the two bills L47432018A and B44557641A inven-

toried by Agent Knudsen to the defendant McGuire. It is obvious that the defendant secreted the five-hundred dollar roll of currency under the chair while being detained at the Metropolitan Police Department on the 23rd of November, 1971.

From all the evidence, the Court is satisfied beyond a reasonable doubt that the defendant had willful and knowing possession of five hundred dollars in currency stolen from a federally insured bank with the knowledge that the money was so stolen.

/s/ Frank Gray, Jr.
Chief Judge

Received November 21, 1974

No. 75-1585

In the Supreme Court of the United States

OCTOBER TERM, 1975

FOREST D. McGUIRE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-3a) is not yet reported. The opinion of the district court (Pet. App. 5a-10a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on February 23, 1976. A petition for rehearing was denied on March 30, 1976 (Pet. App. 4a). The petition for a writ of certiorari was filed on April 29, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether incriminating evidence discovered by police officers at police headquarters under a chair on which petitioner previously had been sitting should have been suppressed as the fruit of an illegal arrest.

2. Whether the prosecution was barred by collateral estoppel from eliciting from a government witness an explanation that his testimony at an earlier trial not involving petitioner had been erroneous.

STATEMENT

After a jury-waived trial in the United States District Court for the Middle District of Tennessee, petitioner was convicted of knowing possession of money stolen from a federally insured bank, in violation of 18 U.S.C. 2113(c). He was sentenced to six years' imprisonment. The court of appeals affirmed (Pet. App. 1a-3a).

The facts, as found by the district court (Pet. App. 5a-9a), were that in the early morning of October 14, 1971, burglars used an acetylene torch and burning bar to break into the safe of a federally insured bank in Fallston, North Carolina, from which they removed more than $14,357 in currency, some of which had been partially burned during the burglary; they also removed two packages of twenty-dollar bills whose serial numbers previously had been recorded on lists retained by the bank manager (Pet. App. 5a).

Soon thereafter, the resident manager of an apartment house in East Nashville, Tennessee received as rent payments from tenants in two apartments currency that was partially burned. The resident manager thereupon notified government agents, who determined that information supplied to the apartment manager by one of the tenants regarding the tenant's place of employment was false (Pet. App. 6a). The agents then went to the apartments to question the tenants. A woman departed from the first apartment just as the agents arrived; the remaining occupant identified himself as Lawrence Brooks and stated that the woman was his wife, and that she was going to the store.

When the agents reached the second apartment, they learned that a man had just left the first apartment through an open window. At the second apartment, the agents found petitioner, another man who identified himself as Arrites Oden, and the woman whom the agents had seen leaving the first apartment. The woman told the agents that the male occupant of the first apartment was Raymond Perry; she denied that she was his wife. The man who identified himself as Oden said that he was the tenant of the second apartment, and he gave as his place of employment a company that the agents knew did not employ anyone residing at the apartment building.

When the agents asked petitioner why he was in the apartment, petitioner stated that he had come there to visit a friend. The friend to whom petitioner referred was not present, however, and petitioner stated that he did not know the whereabouts of his friend. The officers arrested petitioner, Oden and the woman.

After petitioner arrived at police headquarters, one of the police officers on duty observed petitioner reach under the chair on which he was seated. After petitioner departed, the officer discovered under the chair three $100 bills and ten $20 bills, some of which had been partially burned. Two of the $20 bills subsequently were identified as having been stolen from the Fallston, North Carolina bank.

ARGUMENT

1. Petitioner contends that the currency discovered by the police officer under a chair on which petitioner had sat at police headquarters following his arrest should have been suppressed as the fruit of an unlawful arrest. Petitioner, however, never claimed a possessory interest in the currency. At the hearing on petitioner's pretrial motion to suppress, petitioner testified that he had no

knowledge of the currency discovered in the police station, and that he had never seen or received it (Tr. 21-22).[1] Accordingly, petitioner has no standing to complain of the seizure of the currency. *Brown* v. *United States*, 411 U.S. 223, 227; *Simmons* v. *United States*, 390 U.S. 377; *Jones* v. *United States*, 362 U.S. 257, 261. Moreover, even if petitioner once had a possessory interest in the currency, petitioner had abandoned the currency and therefore relinquished possession by the time the police officer discovered it. *Abel* v. *United States*, 362 U.S. 217, 241.

In any event, the district court correctly denied petitioner's motion to suppress, since the arrest was based on probable cause (Pet. App. 3a). Petitioner was found in an apartment upon which a rental payment recently had been made with currency that had been burned, soon after a bank burglary committed with the use of an acetylene torch and burning bars. Petitioner was in the company of a woman whom the agents previously had seen at another apartment upon which a rental payment also had been made with burned currency. The woman provided information that contradicted information that had been provided by the occupant of the former apartment. Petitioner also was in the company of another individual who provided information which the agents knew to be false. Finally, when asked to explain his presence in the apartment, petitioner stated that he was there to visit a friend whose whereabouts was unknown.

2. At the trial of two individuals charged with committing the bank burglary, a police detective testified that police officers had searched the two above-mentioned apartments pursuant to warrants and had discovered

[1]"Tr." refers to the one-volume transcript of the trial and pretrial hearing on petitioner's motion to suppress, which has been lodged with the Clerk of this Court.

incriminating evidence in each location, including two $20 bills that had been stolen from the bank.

Subsequently, at petitioner's trial, the government attempted to show that the same two $20 bills actually had been discovered under the chair upon which petitioner had been sitting at police headquarters. Defense counsel moved to compel the government to bind itself to the account given at the former trial. The court, however, permitted the police detective who had testified at the former trial to explain that testimony; he stated that on taking the stand he had been presented with a basket of evidentiary materials, including envelopes containing currency found in one of the apartments, but that he had not been aware that the basket also included one envelope which contained bills that had been discovered at police headquarters (Tr. 78-85).

Petitioner contends that the prosecution was barred by collateral estoppel from changing its identification of the currency. The principle of collateral estoppel is applicable, however, only where an ultimate fact has once been determined by a final judgment in a case litigated by the same parties to the subsequent litigation. *Ashe* v. *Swenson*, 397 U.S. 436, 440. Petitioner, however, was not previously tried; he was not a party to the prior proceedings; and there is no showing that the identification of the currency constituted an issue of ultimate fact necessary for conviction in the prior case. Moreover, the government had a responsibility to disclose that it had erroneously identified the currency in the former trial, and to correct the error. Cf. *Napue* v. *Illinois*, 360 U.S. 264. Any prior inconsistency in the witness's testimony merely went to the witness's credibility. *United States* v. *Hill*, 463 F.2d 235 (C.A. 5), certiorari denied, 409 U.S. 952.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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JUNE 1976.

DOJ-1976-06

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1585

FOREST D. McGUIRE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

REPLY BRIEF FOR PETITIONER

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UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

REPLY BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. 1a-3a) is not yet reported. The opinion of the District Court (Pet. App. 5a-10a) is not reported.

JURISDICTION

The judgment of the Court of Appeals was entered on February 23, 1976. Petition for Rehearing was denied on March 30, 1976 (Pet. App. 4a). The petition for a writ of certiorari was filed on April 29, 1976. The Government's Brief in opposition was received on July 1, 1976. The jurisdiction of this Court is invoked under 28 USC 1254(i). Rule 19-1(b).

STATEMENT

The purpose of Petitioner's Brief in Reply is to answer several contentions advanced by the Government in its brief in opposition. The facts of the instant matter, and all opinions below have been fully set forth in the Petition for a Writ of Certiorari filed in this Court on April 29, 1976.

ARGUMENT

1. The Government first contends that petitioner has no standing to complain of the seizure of the currency which formed the basis of his conviction. Claiming that petitioner never asserted a possessory interest in the currency seized, the government contends that petitioner now has no right to attack the unlawful arrest which led directly to that seizure.

However, the Government cites the very authority which clearly establishes petitioner's standing to object to the lawfulness of his arrest. *Jones v. United States*, 362 U.S. 257, first established the broad principle that applies here:

> The possession on the basis of which petitioner is to be and was convicted suffices to give him standing under any fair and rational conception of the requirements of Rule 41(e). 4 L.Ed. 2d 697, 703.

Additionally, *Simmons v. United States*, 390 U.S. 377, cited by the Government solidifies petitioner's right to contest the search and seizure. Although *Simmons* had been interpreted to limit the rule of automatic standing as set down in *Jones*, the facts of the instant case are not affected by the holding in Simmons.

The Defendants in Simmons were charged with a non-possessory offense (bank robbery) which necessitated testimony by the accused in order to establish the requisite standing. This dilemma of requiring an accused to forgo his Fifth Amendment right in order to assert his Fourth Amendment right, resulted in the Court's holding that any testimony given during a pre-trial motion to suppress which linked an accused to property seized could not be used against him directly if he took a contrary position at trial.

This situation does not obtain in petitioner's case. The very nature of the prosecution requires that the government prove a sufficient interest in the property by petitioner in order to convict him beyond a reasonable doubt.

Finally, this court held in *Simmons*, in addition to reaffirming the principle as set down in *Jones* involving possessory offenses, that:

> . . . we held alternatively that the defendant need have no possessory interest in the searched premises in order to have standing. It is sufficient that he be legitimately on the premises when the search occurs. at 390.

Petitioner was arrested in the apartment, and forcibly brought to the Nashville Police Station where he was searched at least twice and questioned extensively. While the evidence was hotly disputed as to when, where and from whom the money was actually recovered, the Government alleged at trial and proved to the satisfaction of the trial judge, that the money was recovered at some point in time while Petitioner was in custody.

The Government has never denied that the money was seized as a direct result of petitioner's arrest. That being conceded, if the arrest was not based upon probable cause, petitioner has the right to request that all evidence seized be suppressed. *Brown v. Illinois*, 422 U.S. 590 (1975).

2. As the Government's Brief in opposition raises no new matters concerning petitioner's Due Process argument, petitioner will rely on the argument and authorities presented in the Petition for Certiorari previously filed.

CONCLUSION

For the foregoing reasons, and the reasons previously presented, Petitioner respectfully prays that the Writ of Certiorari issue from this Honorable Court to the Sixth Circuit Court of Appeals to review that court's opinion in the instant case.

Respectfully submitted,

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